No. 92-6921

In The

Supreme Court of the United States

October Term, 1993

JOHN PATRICK LITEKY,
CHARLES JOSEPH LITEKY, AND
ROY LAWRENCE BOURGEOIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED

Whether 28 U.S.C. §455(a), which provides that "any judge . . . shall disqualify himself in any proceeding in which his impartiality may reasonably be questioned," requires that the cause of the appearance of bias stem from an extrajudicial source?

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This appeal arises from the judgment of the Eleventh Circuit Court of Appeals dated September 28, 1992 which affirmed the decision of United States District Court for the Middle District of Georgia. *United States v. Liteky*, 973 F.2d 910 (11th Cir. 1992).

JURISDICTION

Petitioners John Liteky, Charles Liteky and Roy Bourgeois were convicted of willfully injuring federal property in violation of 18 U.S.C. §1361. They were sentenced to guideline terms of six months, six months and 18 months, respectively. The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court in a published opinion filed September 28, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

Title 28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

ARGUMENT

Petitioners twice moved for the district judge's recusal in this case, not on the basis of his rulings in prior judicial proceedings, but rather due to his conduct, which gave rise to an appearance of partiality. On the basis of obsolete legal formalism, the district judge, Judge J. Robert Elliott, refused even to consider the merits of petitioners' motion for recusal; this error of law requires reversal of petitioners' convictions.

Because the district judge erroneously refused to consider petitioners' argument that his conduct during prior judicial proceedings gave rise to an appearance of bias, and because harmless error analysis does not apply to violations of 28 U.S.C. §455, this Court should, at a minimum, remand this case to the Eleventh Circuit Court of Appeals for further proceedings.

Alternatively, if this Court concludes that Judge Elliott's conduct was so inimical to the appearance of impropriety as to threaten confidence in the judiciary, it should reverse petitioners' convictions and remand for a new trial.

I. CONGRESS, BY THE ADOPTION OF 28 U.S.C. §455, INTENDED TO REMOVE THE EXTRAJUDICIAL SOURCE REQUIREMENT

Respondent contends that the 1974 amendments to Section 455 were not intended to "dramatically alter the

law of recusal for bias or prejudice." Resp. Br. at 19.[1] In fact, however, congress did intend the 1974 revisions to alter significantly the grounds for recusal. H.R. Rep. No. 1453, 93d Cong., 2d Sess. 1-2 (1974) ("House Report"). Indeed, attorney John Frank, upon whose interpretation of Section 455(a) respondent relies, exclusively, in defending the extrajudicial source requirement, insisted at legislative hearings on the 1974 Act that Section 455 "needs a complete rewrite." *Hearing on S. 1064 before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, 93rd Cong., 1st Sess.* 113 (1973) ("*Senate Hearing*").

Respondent correctly points out that under the new Section 455(a), "the statute leaves to the courts the task of determining what circumstances may be said to raise reasonable questions regarding the court's impartiality." Resp. Br. at 20. Respondent offers no explanation, however, for why it is reasonable to believe that bias acquired in the course of a judicial proceeding is innocuous. Nor does respondent explain why a judicially-acquired appearance of bias does not threaten the public's confidence in the judiciary, the motivating concern behind the adoption of the amendments to Section 455(a). *See* House Report at 5. In fact, where courts have been free to

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[1] Respondent repeatedly characterizes elimination of the extrajudicial source requirement as a "dramatic" and "fundamental" change. *See id.* at 19, 22, 27. It is somewhat disturbing that the Solicitor General of the United States considers the notion that a criminal defendant is entitled to an impartial judge free of bias and prejudice regardless of source, to be such a radical concept.

fashion their own notion of "reasonableness" in developing standards for judicial disqualification, they have concluded that bias arising in the course of judicial proceedings is relevant to the disqualification inquiry. *See, e.g., Offutt v. United States*, 348 U.S. 11, 16-18 (1954) (appellate court's supervisory authority includes power to order judicial disqualification on the basis of courtroom conduct); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 97 (3d Cir. 1992) (same); *United States v. Jacobs*, 855 F.2d 652, 656 (9th Cir. 1988) (same).

Respondent also suggests that abrogation of the extrajudicial source requirement would be inefficient because it would lead to mid-trial mandamus petitions, interrupting "virtually every trial." Resp. Br. at 30. Respondent offers no indication, however, that mandamus petitions have skyrocketed in any of the Circuit Courts of Appeal which have held that Section 455(a) requires recusal for judicially-acquired bias. In fact, computer-assisted legal research has revealed that since the First Circuit's landmark decision in *United States v. Chantal*, 902 F.2d 1018 (1st Cir. 1990), no mandamus petitions have been brought on the basis of Section 455(a) for judicially-acquired bias in the First Circuit.[2] If anything, elimination of the extrajudicial source requirement will increase judicial efficiency because judges, once liberated from the yoke of archaic legal formalism, will be free to make the correct recusal decision in the first instance,

[2] Search of LEXIS, Ganfed Library, 1 Cir File (Sept. 14, 1993) (search for records containing RECUSE and MANDAMUS in full text).

rather than being forced to preside over the trial, only to face judicial disqualification on appeal.[3]

The only other justification respondent offers for continued adherence to the extrajudicial source requirement under Section 455(a) rests on the statements of Lewis & Roca attorney John Frank to a Senate Subcommittee during a hearing on the bill which amended Section 455. Resp. Br. at 22-25.[4]

The first statement on which respondent relies occurred during a discussion over the meaning of Section 455(a):

> *MR. KASTENMEIER.* Page 1, line 6, I am wondering what the practical meaning of this is:

[3] Although many circuits forbid a judge from recusing herself on the basis of judicially-acquired bias, they will nonetheless disqualify a judge on remand if her courtroom conduct gives rise to an appearance of bias. *See, e.g., Jacobs*, 855 F.2d at 656 & n.2.

[4] Mr. Frank was not involved in drafting the amended §455 which Congress ultimately adopted. Nor did Congress consider Mr. Frank's statements sufficiently important to be included in the reports. S. Rep. No. 419, 93d Cong., 1st Sess. (1973); House Report. Nor is there *any* indication that *any* member of Congress accepted Mr. Frank's interpretation of §455(a). Respondent insists Mr. Frank's statements merit serious consideration because he drafted one of the predecessor bills to S. 1064. Resp. Br. at 22 & n.12. Importantly, however, neither of the predecessor bills to S. 1064 contained language with even remote similarity to that which was ultimately adopted as §455(a). S. 1553, 93rd Cong., 1st Sess. (1971); S. 1886, 93rd Cong., 1st Sess. (1971).

> Any justice shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

MR. FRANK. May I address myself to that? As you have said, the Committee does not deal with this commonly and therefore you may be unaware that these are terms of art. . . .

For example, it has been the fixed practice that a judge may have developed points of view on a matter because he has handled the same matter previously and been involved in it; something of that sort. To the extent he has made up his mind. To challenge on that ground is not permitted by this clause at all. It is meant to cover the kind of thing where, for example, personal relationships are involved.

Hearing on S. 1064 before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93rd Cong., 2d Sess. 14-15 (1974) (*"House Hearing"*).

According to respondent, Mr. Frank's statement "can only be understood as a reference to the extrajudicial source requirement." Resp. Br. at 24. In fact, however, it is much more likely that Mr. Frank was simply referring to large multi-case class action litigation.[5] He was seeking to assure the subcommittee that mere participation in the same matter previously would not require a judge to disqualify herself. Nothing in Mr. Frank's statement should be read as implying that a judge should continue

[5] This Court has recognized such cases present "unique difficulties in monitoring any potential interest." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 862, n.9 (1988).

to preside over a matter once she has recognized that her conduct in a prior judicial proceedings has given rise to an appearance of bias.

Moreover, there is no indication that Mr. Frank believed Section 455(a) was exclusively limited to personal relationships. Indeed, if that were Congress's intent, it would have included the word "personal" in the language of that subsection, much as it did in Sections 144 and 455(b)(1).[6]

Respondent also relies on the following passage:

> Mr. Frank. The judge, unless his impartiality may reasonably be questioned in terms of common traditions of what is a reasonable doubt, does have a duty to sit. He is required to go back to the books and find out what the traditions and practices have been. There will be growth and change, of course, as there always will be in the common law, but Chief Justice Traynor . . . was not telling judges to go off and take vacations just because cases were uncomfortable. That is not what this means. You concur, I believe.
>
> Judge Traynor. Right.

House Hearing at 15. This passage does not refer to the extrajudicial source requirement, but rather addresses

[6] It is also clear that Judge Traynor, with whom Mr. Frank testified at the House Hearing, believed that Section 455(a) was broad enough to cover more than personal relationships. *See Senate Hearing* at 86-89 (suggesting that a judge who expressed an opinion concerning the merits of the controversy while in government service should recuse herself under both §455(a) and §455(b)(3)).

Congress's concern that judges may use Section 455 to avoid sitting in difficult or controversial cases. Furthermore, for the purpose of this case, the pertinent tradition and practice for the law of recusal is that the word "personal" correlates with "extrajudicial." Indeed, the genesis for the extrajudicial source requirement was Congress's use of the word "personal" in 28 U.S.C. §144. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). A judge who went back to the books to "find out what the traditions and practices have been" would therefore reasonably conclude that by dropping the word "personal" in Section 455(a), Congress intended to abandon the extrajudicial source requirement.[7]

In this respect, Congress's adoption of Section 455(a), and its corresponding expansion of the grounds for recusal to include nonpersonal, judicial, bias does not "change the interpretation of a judicially created concept." *See Midlantic National Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 501 (1986). Rather, petitioners' interpretation of Section 455(a) is faithful to the judicial interpretation of Section 144 and prior recusal decisions.

Respondent's interpretation of the legislative history, in contrast, is at odds with Congress's expressed intent. Respondent maintains that the amendments to Section 455(a), served only to replace the subjective "bias-in-fact"

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[7] Mr. Frank's statement that §455(a) includes "terms of art" also supports this reading of the statute. To the extent that the word "personal" is a term of art, its omission from §455(a) is significant; in this case, determinative.

standard with an objective "appearance-of-bias" standards and to abandon the "duty to sit" rule. Resp. Br. at 20-21. Respondent also concedes, however, that Section 455(a) "broadened the *grounds* for disqualification." *Id.* at 28 (emphasis added). If respondent's interpretation is correct, Congress's amendments would not have "broadened the grounds," but rather only altered the standards, for judicial disqualification. By broadening the grounds for disqualification, Congress intended to create an entirely new basis for recusal. Respondent's theory that the amendments to Section 455 only altered the standards for recusal is therefore too narrow to give effect to Congress's expressed intent.

Congress's intent is not ambiguous. It intended to broaden the grounds for judicial disqualification by abrogating the extrajudicial source requirement. Its intention to allow for recusal based on judicially acquired bias is clearly articulated by the notable absence of the word "personal" in the text of Section 455(a).

II. ALLEGATIONS OF APPEARANCE OF BIAS BASED ON A JUDGE'S CONDUCT ARE SUFFICIENT TO REQUIRE RECUSAL

Those courts which have rejected the extrajudicial source requirement recognize that a judge's conduct during the course of trial justifies recusal if it gives rise to an appearance of bias. *See United States v. Chantal*, 902 F.2d 1018, 1022 (1st Cir. 1990) (district judge's demeaning comments toward defendant could form basis for recusal); *Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 155-57 (6th Cir. 1979) (*sua sponte* recusing district court judge due to his

criticism of a party during a pretrial hearing); *see also United States v. Hickman*, 592 F.2d 931, 933-36 (6th Cir. 1979) (district judge's one-sided interventions and interruptions of cross-examination denied defendant a fair trial).

Respondent concedes that improper *conduct* can require recusal, Resp. Br. at 38-39 & 19, but nonetheless mischaracterizes petitioners' recusal motions as based on Judge Elliott's adverse *rulings*. Resp. Br. at 29-38. According to respondent, "[t]his is not a case in which the judge whose disqualification is sought made statements expressing bias or animosity towards petitioners." Resp. Br. at 38. In fact, that is precisely what petitioners argued in their motions for recusal. The record is clear that the recusal motions were premised on the judge's conduct, not his rulings. *See* Defendants' Motion to Recuse (filed Feb. 4, 1991) (Joint Appendix, p. 2); Trial transcript, *United States v. Liteky*, Case No. 91-93 Col, 251-52 (M.D. Ga. Mar. 25, 1991) ("1991 Trans.").

Respondents may disagree that Judge Elliott's conduct was so improper as to require recusal had he considered petitioners' motions, but that dispute is purely academic because he refused to do so. As a result, if this Court finds that the extrajudicial source limitation does not apply to recusal motions brought pursuant to Section 455(a), Judge Elliott's refusal to consider petitioners' motions was an error of law. The particular factual circumstances which petitioners contend give rise to an appearance of impartiality are relevant only to a determination of the appropriate remedy for that error of law.

Petitioners agree that "adverse rulings *in themselves* do not create judicial partiality." *Quanchita Nat'l Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982) (emphasis added).[8] Petitioners' allegations of appearance of partiality, however, center on Judge Elliott's conduct. For example, Judge Elliott's interruption of Father Bourgeois' attorney's cross-examination of the alleged assault victim was not an error of law. It was, however, disruptive, demeaning, and one-sided. Trial Transcript, *United States v. Ventimiglia*, C.A. No. 83-316-COL, 100 (M.D. Ga. Sept. 14, 1983) ("1983 Trans.").[9] As such, when considered in light of Judge Elliott's repeatedly one-sided conduct throughout the 1983 trial, this episode gives rise to an appearance of bias.[10]

Similarly, petitioners do not contend that Judge Elliott was legally in error for refusing to refer to Father

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[8] However, a judge's erroneous rulings, including sentencing decisions, when combined with other episodes of conduct reflecting an appearance of bias, can form the grounds for disqualification. *United States v. Holland*, 655 F.2d 44, 46-47 (5th Cir. 1981) (disqualifying district judge under § 455(a) for increasing defendant's sentence because he appealed an earlier conviction, among other reasons).

[9] The manner in which Father Bourgeois made physical contact with the alleged assault victim was a disputed factual issue. Judge Elliott's interruption evidenced the fact that he sided with the government's interpretation of events.

[10] Nor does the fact that the 1983 trial was not in the presence of a jury mitigate the appearance of bias which resulted from Judge Elliott's conduct at that trial. *See Holland*, 655 F.2d at 47, n.5 (rejecting "the Government's argument that there was no bias because the trial judge's comments were made outside the presence of the jury").

Bourgeois by his appropriate title: "Father." 1983 Trans. at 22, 35, 36, 38, 50, 58, 59, 60, 63, 66, 78, 93, 94. Rather, this discourtesy simply highlights Judge Elliott's attitude toward Father Bourgeois throughout the entire 1983 trial.

At the 1991 trial, as well, it was Judge Elliott's conduct to which petitioners objected. For example, Judge Elliott's threat to issue bench warrants for petitioners' arrest before the entire jury venire, which was precipitated by their unavoidable delay at the metal detector on the first floor of the courthouse, was not legally erroneous. 1991 Trans. at 3-4. It was, however, intemperate and unnecessary for Judge Elliott to issue this stinging condemnation in front of prospective jurors. If Judge Elliott were interested in maintaining an atmosphere of decorum and fairness, he would have called counsel into chambers and inquired as to petitioners' whereabouts. Likewise, Judge Elliott's heated statement that Petitioner Charles Liteky was nothing more than a name in the indictment was demeaning and unnecessary personal criticism. 1991 Trans. at 211. That Judge Elliott's decision to cut off Liteky's testimony concerning his background erroneously prevented him from introducing pertinent state of mind evidence made that episode even more inappropriate, but it was the unnecessarily demeaning conduct, not the error of law, which petitioners argue gives rise to an appearance of bias.

Furthermore, the district judge's decision to exclude evidence of petitioners' state of mind when offered by petitioners, yet to admit such evidence when the prosecution sought its admission, was one-sided, regardless of whether it was technically in error. 1991 Trans. at 196-97;

199-200. His disparaging references and repeated expressions of preference toward the prosecution in repartee with defendants are all conduct indicative of bias.

Respondent's incessant focus on isolated individual rulings is misleading. The conduct surrounding a ruling or interaction with the parties is the essence of the subjective measurement of bias.

> " . . . nothing prevents a thing being good in itself, and yet becoming a source of evil to one who makes use thereof unbecomingly . . . ".

Summa Theologica, St. Thomas Aquinas; First Complete American Edition in 3 Volumes, Vol. 2, p. 1579, literal translation by Fathers of the English Dominican Province, 1947.

Petitioners' motions for recusal were based on Judge Elliott's "statements expressing bias or animosity towards petitioners," not simply in response to adverse legal rulings.

In fact, one of the best single examples of conduct indicating bias which is not a ruling was Judge Elliott's refusal to sign the CJA-24 form and sending this form for payment for the transcript back to the Eleventh Circuit because he would not grant leave to appeal *in forma pauperis*.

Because the text, history and policy of Section 455(a) makes clear that judicial conduct which gives rise to an appearance of bias provides adequate grounds for a motion for recusal, Judge Elliott's refusal to consider petitioners' motions was in error.

III. REVERSAL OF PETITIONERS' CONVICTIONS AND REMAND FOR A NEW TRIAL IS THE CORRECT REMEDY IN THIS CASE

In a footnote respondent argues, relying on this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), that violations of Section 455(a) are subject to harmless error analysis. Resp. Br. at 47, n.28.[11] *Liljeberg* does not, however, stand for the proposition that harmless error analysis can apply to a situation in which a district judge denies a criminal defendant's motion for recusal due to an erroneous legal determination.

First, *Liljeberg* involved the unique situation where a civil litigant sought to have a judgment against him vacated pursuant to Fed.R.Civ.P. 60(b). *Liljeberg*, 486 U.S. at 862.

Second, this Court only indicated that harmless error analysis could apply in situations where "a busy judge . . . inadvertently overlook[ed] a disqualifying circumstance." *Id.* at 862. That is not the case here. In this case, Judge Elliott refused even to consider the merits of petitioners' motions for recusal because he erroneously

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[11] Respondent also cites *United States v. Balistrieri*, 779 F.2d 1191, 1204-05 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986) for the proposition that "it is open to question whether the erroneous denial at trial of a motion to recuse under Section 455(a) may ever appropriately lead to reversal of a conviction." Resp. Br. at 47, n.28. *Liljeberg*, however, decided three years after the *Balistrieri* decision, answered that question. In *Liljeberg*, this Court vacated a judgment against petitioner on the basis of § 455(a). 486 U.S. at 862-70.

believed that Section 455(a) did not permit him to consider bias which arose in the course of judicial proceedings.

Third, harmless error analysis cannot apply to recusal decisions in criminal cases. Respondent does not dispute that criminal cases involving a judge's actual bias or prejudice are immune from harmless error analysis. *See Chapman v. California*, 386 U.S. 18, 23, n.8 (1967); *Tumey v. Ohio*, 273 U.S. 510 (1927). Nor does respondent dispute that the "appearance of impartiality is virtually as important as the fact of impartiality." *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358, 1361 (10th Cir. 1977). These two long-standing and unchallenged rules of law, when taken together, yield the unmistakable conclusion that harmless error analysis does not apply to violations of Section 455(a) in criminal trials. *See Sullivan v. Louisiana*, ___ U.S. ___, 133 S.Ct. 2078, 2081-83 (1993).

The absence of harmless error analysis in this case requires that petitioners' convictions be reversed. *See Chantal* 902 F.2d at 1024 (reversing guilty plea). Whether this Court should also remand this case for a new trial, or simply remand to the Eleventh Circuit for additional proceedings,[12] turns on "the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864.

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[12] The Eleventh Circuit would then have to decide whether to remand for a new trial in light of petitioner's allegations of appearance of bias or remand to the district judge for reconsideration of petitioners' original motions for recusal. *See id.* at 1024 (remanding to district judge to consider defendants' motion for recusal).

In evaluating the appropriate remedy in this case, this Court should consider not only those instances of conduct specifically presented to the district court in petitioners' original motions to recuse, but the entire record of proceedings at both the 1983 and 1991 trials and the events which have occurred subsequent to the 1991 trials. *Cf. Liljeberg*, 486 U.S. at 867 (judge's rationale for denying petitioners' motion for recusal contributed to risk of undermining public's confidence in judiciary).[13]

Respondent addressed some of the particular instances of Judge Elliott's conduct cited in Petitioners' Brief on an incident-by-incident basis, but refused to consider the impact of Judge Elliott's one-sided and demeaning comments when taken as a whole. Resp. Br. at

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[13] Respondent repeatedly accuses petitioners of having waived particular grounds for recusal by not raising them at the district court level. Resp. Br. at 42-43. This argument, however, misses the point that the specific instances of conduct which petitioners have cited to this Court are only relevant for the purpose of remedy, not assignment of error. The error in this case was a pure and unadulterated error of law. Moreover, petitioners twice moved for the district judge's recusal. They should not be forced to punctuate every episode of the judge's discourteous and demeaning conduct with an objection and another motion for recusal. *Cf. Hickman*, 592 F.2d at 936 (defendant's decision not to object to judge's conduct for fear of further antagonizing both judge and jury did not prevent consideration of judge's conduct in fair trial inquiry).

38-47.[14] The ABA Standards for Criminal Justice, §6.34 at 33 (2d ed. 1980) admonish that:

> The trial judge should be the exemplar of dignity and impartiality. The judge should exercise restraint over his or her conduct and utterances. The judge should suppress personal predilections, and control his or her temper and emotions. The judge should not permit any person in the courtroom to embroil him or her in conflict, and should otherwise avoid personal conduct which tends to demean the proceedings or to undermine judicial authority in the courtroom. When it becomes necessary during the trial for the judge to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, the judge should do so in a firm, dignified, and restrained manner, avoiding repartee, limiting comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

A complete review of the record in this case reveals that the district court judge departed from the standards of decorum and impartiality required of him. Pet. Br. at

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[14] Importantly, although respondent purports to address each issue raised by petitioners, it ignores several of the most egregious instances of Judge Elliott's conduct. For example, respondent does not dispute that Judge Elliott's disparaging remarks concerning Father Bourgeois' codefendant's invocation of his Fifth Amendment rights were improper. Respondent also apparently agrees that Judge Elliott's finding of "no probable cause" for petitioners' *in forma pauperis* appeal was in error.

28-39. The record, when taken as a whole, reflects an appearance of bias which risks undermining the public's confidence in the judiciary and requires a new trial.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court reverse their convictions and remand their case for retrial before an impartial judge or, in the alternative, reverse their convictions and remand the case to the Eleventh Circuit for a determination as to whether Judge Elliott should have recused himself under 28 U.S.C. §455(a) for judicially-acquired appearance of bias.

Respectfully submitted,

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